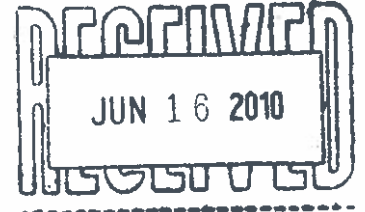


UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE



GRAHAM FRENCH,
Appellant,

DOCKET NUMBER
AT-0752-10-0545-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: June 10, 2010

Don J. Eiermann, Redstone Arsenal, Alabama, for the appellant.

Walter A. Baker, Redstone Arsenal, Alabama, for the agency.

BEFORE

Lynn P. Yovino
Administrative Judge

INITIAL DECISION

INTRODUCTION

On February 2, 2010, the appellant filed an appeal from the agency's action terminating his law enforcement availability pay (LEAP) effective March 14, 2010.¹ The appellant is employed by the agency as a Criminal Investigator, GS-1811-11, with the Department of the Army at Redstone Arsenal, Alabama. For the reasons below, the agency's action is REVERSED.

¹ The record reflects that the agency did not provide the appellant with appeal rights regarding this action. Thus, the time limit for filing the appeal is waived.

ANALYSIS AND FINDINGS

The appellant is a Criminal Investigator in the GS-1811 series. He receives availability pay pursuant to an annual certification under the Law Enforcement Availability Pay Act of 1994 (LEAPA), 5 U.S.C. § 5545a. This case involves an action taken by the agency to terminate that pay authorized by the certification.

The agency moved to dismiss the appeal for lack of jurisdiction arguing that the appeal concerned a premium pay matter, not a reduction in pay. Appeal File, Tab 5. The appellant responded to the agency's motion and, after considering the submissions of the party, a telephonic status conference was conducted with the parties on May 13, 2010 and an Order To Show Cause why the agency action should not be reversed as a matter of law was issued May 25, 2010. The agency responded that it had no further argument or evidence. Appeal File, Tab 11.

The Board has jurisdiction over reductions in pay. *See* 5 U.S.C. § 7512(4). "Pay" is defined as "the rate of basic pay fixed by law or administrative action for the position held by an employee." 5 U.S.C. § 7511(a)(4). "Premium pay" is typically not part of the basic rate of pay and a denial of premium pay is not appealable as a reduction in pay. For Criminal Investigators, however, an "involuntary suspension of availability pay resulting from a denial or cancellation of certification under paragraph (d) of this section is a reduction in pay for the purposes of applying the adverse action procedures of 5 U.S.C. § 7512...." 5 C.F.R. § 550.184(e).

To be entitled to availability pay under LEAPA, the criminal investigator and appropriate supervisory officer "shall make an annual certification to the head of the agency attesting that the investigator currently meets, and is expected to meet, during the upcoming one-year period, the substantial hours requirement in section 550.183." 5 C.F.R. § 550.184(b). Other than leaving federal service, leaving the agency, being reassigned out of the criminal investigator series, or voluntarily opting out of the program—situations where certifications no longer

apply—there are only two other bases for denying or canceling a certification. 5 C.F.R. § 550.184(c) and (d). Under subsection (d), the agency may deny or cancel a certification based only on a finding that an investigator has failed to perform unscheduled duty as assigned or reported, or is unable to perform unscheduled duty for an extended period due to physical or health reasons.”

The motion to dismiss was based on the agency’s belief that the Board’s holdings in *Gaffney v. Department of the Army*, 81 M.S.P.R. 241 (1999), and *Martinez v. Department of the Treasury*, 71 M.S.P.R. 262, 264 (1996), *aff’d*, 126 F.3d 1480 (Fed. Cir. 1997), support its position that the agency can terminate the appellant’s LEAPA because it did not issue a specific denial of certification. Instead, the agency simply terminated his entitlement to the availability pay.

Martinez involved a case where the appellant was reassigned out of the Criminal Investigator position; section 550.184(c) specifically provides that a certification of availability pay under LEAPA no longer applies. *Gaffney* involved a case where the agency had never issued a certification in the first place. Thus, there was no specific denial or cancellation of certification that would provide the Board with jurisdiction.

Herein, on April 4, 2009, the appellant and his supervisor signed the annual certification for availability pay, rendering the certification valid until October 1, 2010, at which time it would be recertified. Agency Response, Tab 4h. On November 23, 2009, the Director of the Directorate of Emergency Services wrote a memorandum recommending termination of LEAP for the appellant and two other criminal investigators. AR, Tab 4g. On December 16, 2009, the Garrison Commander approved that recommendation. AR, Tab 4f.

On February 12, 2010, the Director of the Directorate of Emergency Services issued a Memorandum terminating LEAP for lack of work; on March 3, 2010, he issued a final notice terminating LEAP stating that it was not cost-effective to continue paying LEAP. AR, Tab 4e. This appeal followed.

The agency's action did not cite any of the regulatory bases for canceling the appellant's eligibility for LEAP pay. That the agency argues that it simply terminated the appellant's LEAP pay and did not cancel any certification is not supported by the agency's own evidence. A certification was issued, it was acted upon, and the appellant, who remains in a Criminal Investigator position and is ready and willing to serve, is being denied the entitlement that that certification provides.

Thus, the agency's action must be reversed² as a matter of law.³

DECISION

The agency's action is REVERSED.

ORDER

The agency is ORDERED to restore the appellant's law enforcement availability pay effective March 14, 2010.

I ORDER the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I ORDER the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I ORDER the agency to pay appellant by check or through electronic funds transfer for the

² The appellant is not raising any affirmative defenses in this appeal.

³ The agency action also fails as a denial of due process inasmuch as the agency did not provide the appellant with notice of its intent to cancel the LEAP and an opportunity to respond.

undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.


I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

INTERIM RELIEF

Although appellant is the prevailing party, I have determined not to order interim relief pursuant to 5 U.S.C. § 7701(b)(2)(A) because the decision requires the payment of funds from the treasury and those payments may, on appeal, be determined not to be authorized. FOR THE BOARD:

FOR THE BOARD:



Lynn P. Yovino
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on July 15, 2010, unless a petition for review is filed by that date or the Board reopens the case on its own motion.